Foods (Wholesalers) Ltd.[3] In my judgment that case has no application to this case, as the facts there were different. The two persons who retired with the Commissioner in this case were not parties to the application, nor were they witnesses. The Commissioner's position here was the same as that of lay justices in England who have to be assisted by their clerks on points of law.

To sum up, the joint application of the landlords was not bad in law. The Commissioner did not in any way act without jurisdiction. In dealing with the application he did not act in violation of the rules of natural justice, because he gave counsel for the tenants an opportunity to state their case. The proceedings before him were not in the nature of a trial in a court of law, so that it was within his power to adopt whatever procedure he considered suitable in order to make such enquiries as he thought fit. In consulting with his legal adviser and the other adviser, neither of whom was a party to the application or a witness, the Commissioner was not guilty of any bias.

I would therefore dismiss these appeals with costs.

Ong C.J. and **Ong Hock Sim F.J.** concurred.

Appeal dismissed.

Solicitors: *A. K. J. D'Cruz & Co.; S. Seenivasagam & Sons; Shook Lin & Bok; Lovelace & Hastings.*

LIM SIEW LEONG & ANOR. v. VALLIPURAM

[F.C. (Azmi L.P., Suffian Ag.C.J. (Malaya) and Gill F.J.) March 2, 1973]

[Johore Bahru — Federal Court Civil Appeal No. 87 of 1972]

Land Law — Agreement for sale of land — Land mortgaged to bank after signing contract — Death of vendor — Persons appointed to represent estate of vendor — Grant of probate not extracted — Action for specific performance and damages — Whether plaintiff can ask for an order for damages.

The respondent had entered into an agreement with one Lim Sian Soon, whereby the latter agreed to sell a portion of his land to the respondent. Lim Sian Soon subsequently mortgaged the whole of his land to a bank. The respondent thereupon brought an action for specific performance and damages. While the action was pending, Lim Sian Soon died and the appellants were appointed to represent the estate and were substituted as defendants in the action. Probate had however not been granted to the appellants. The respondent took out a notice of motion for judgment and the learned judge made an order for damages for breach of contract against the appellants. The appellants thereupon appealed to the Federal Court.

Held: (1) the respondent in the present case had clearly elected to treat the contract as in force notwithstanding the appellant's default and therefore the claim for damages was not sustainable as an independent claim;

(2) the appeal must therefore be allowed and an order by way of specific performance made to require the appellants eventually to transfer the portion of the land to the respondents.

Cases referred to:-

(1) *Ramakrishnanayya* v. *Sreeramalu* A.I.R. 1939 Madras 546.

(2) *Thrope* v. *Fasey* [1949] 1 Ch.D. 649.

(3) *Mama* v. *Sassoon* A.I.R. 1928 P.C. 208; 111 I.C. 413.

(4) *Lee Hoy & Anor.* v. *Chen Chi* [1971] 1 M.L.J. 76.

FEDERAL COURT.

Thara Singh Sidhu for the appellants.

S. G. Thakurta for the respondent.

Gill F.J.: By an agreement dated April 20, 1962 one Lim Sian Soon agreed to sell free from all encumbrances a portion of his land known as Holding 143 at Banda Hilir in the township of Malacca for a sum of $5,000 to C. Vallipuram, the respondent to this appeal and plaintiff in the action from which the appeal has arisen. A sum of $3,000 was paid as deposit towards the purchase price on the signing of the agreement. The balance was to be paid upon the land being subdivided to enable the vendor to convey to the plaintiff as purchaser the area agreed to be sold.

On the strength of the agreement and in good faith the plaintiff built a dwelling house on the area as delineated in the plan annexed to the sale agreement, and he has been and still is in occupation of the dwelling house on the said piece of land by his servant or agent or by his tenant.

Notwithstanding the sale agreement and the occupation by the plaintiff of the portion of land as aforesaid, Lim Sian Soon charged his land to Bank Bumiputra Malaysia Berhad in or about October, 1967. By his solicitors' letters dated November 16, 1968 and February 15, 1969 to Lim Sian Soon and Bank Bumiputra respectively, the plaintiff requested them to perform the obligations contained in the said agreement. On April 7, 1969 Lim Sian Soon's solicitors wrote back to the plaintiff's solicitors to say that arrangements were then being made to discharge the charge in favour of Bank Bumiputra, that their client would make the relevant application for subdivision of his land and for the issue of new titles in respect of such subdivided parts, and that on obtaining fresh titles and when the balance of the purchase price was paid he would transfer the land to the plaintiff.

There was no further correspondence between the parties, but the vendor having taken no steps to complete the sale, the plaintiff issued a writ on March 11, 1970 against Lim Sian Soon and Bank Bumiputra Malaysia Berhad as the first and second defendants respectively, claiming against both defendants specific performance of the agreement and damages in lieu of or in addition to specific performance. His claim in the alternative against the first defendant was for damages for breach of contract or alternatively or in addition recission of the said contract and repayment to the plaintiff of the deposit of $3,000 together with interest. As against the second defendants as the registered chargees of the first defendant's land, the plaintiff claimed a declaration that they were trustees of the portion of the land in question for the plaintiff.

The first defendant entered an appearance on March 21, 1970, but he took no steps to file his defence. On May 7, 1970 the plaintiff took out a summons for directions for an order that notwithstanding the refusal of the first defendant to file his defence the action be set down for trial. In his affidavit in opposition to the summons for directions, the

first defendant stated that he had not filed his defence as he wished to settle the plaintiff's claim. He stated further in his affidavit that in default of his delivering his defence the plaintiff should have set down the action on a motion for judgment under Order 27, rule 11 and Order 40 of the Rules of the Supreme Court, 1957, so that he could file an affidavit in reply setting out the facts and terms of the order to which he would be prepared to consent. Nevertheless, the court made an order on May 29, 1970 that the plaintiff be at liberty to set down his action for trial. In pursuance of that order the plaintiff on June 9, 1970 entered the action for trial.

The first defendant died on December 19, 1970 leaving a will by which he appointed his sons Lim Siew Leong and Lim Siew Chong as his executors and trustees. The action against the second defendants was withdrawn on August 5, 1971 by consent of the parties as the charge to the bank was paid off. The name of the second defendants was accordingly deleted from the title of the action. By an order of court dated August 20, 1971 under Order 16, rule 46, Lim Siew Leong and Lim Siew Chong were appointed to represent the Estate of Lim Sian Soon deceased, for all the purposes of the action, and accordingly they were substituted as the first and second defendants respectively to the action. An order for the grant of probate of the deceased's will to Lim Siew Leong and Lim Siew Chong was made on April 24, 1972 but no grant of probate has been issued up to now because of the delay in finalising the estate duty payable on the Estate.

Pursuant to an order of court dated April 28, 1972 the plaintiff filed and delivered an amended statement of claim, in which the claims against the original second defendants were deleted; otherwise the terms of the original statement of claim and the terms of the amended statement of claim were substantially the same. The prayers in the amended statement of claim against the new defendants were for —

(1) A declaration that the plaintiff is entitled to the portion of the land marked in red in plan No. 9660 (which is referred to in the statement of claim in this action) being 120 feet long x 40 feet wide covering an area of approximately 4100 square feet free from all encumbrances being part of Holding No. 143 (formerly part of Lot 83) Town Area XXX, Grant First Grade (formerly known as Freehold) Malacca.

(2) Specific performance of an agreement between the plaintiff and the said Lim Sian Soon, now deceased dated the 20th day of April, 1962 for the sale by the said Lim Sian Soon to the plaintiff of the portion of the land.

(3) For an order under section 417 of the National Land Code that the Commissioner for Land Titles or the Registrar of Land Titles, Malacca do subdivide the land in such a manner as to give to the plaintiff a separate title to the portion of the land and do make such memorials in, by way of rectification of the Interim Register and the Replacement Title of the land as may give effect to the orders hereon and do all other acts that may be necessary to register the plaintiff as the proprietor thereof.

(4) Damages in lieu of or in addition to specific performance.

(7) Alternatively damages for breach of contract.

(8) Alternatively or in addition recission of the said contract and repayment to the plaintiff of the deposit of $3,000 paid thereunder.

Prayers (5), (6) and (9) were for such further and other relief as the court might deem fit, costs and interest on any decretal amount at 6 per centum per annum from the 20th April, 1962 to date of payment or realisation.

On June 8, 1972 the plaintiff took out a notice of motion, in default of the defendants filing and delivering their defence, for orders in terms identical to the prayers in the amended statement of claim. In his affidavit in support of the motion, the plaintiff recited the events from the time of the filing of the action to the date on which Lim Siew Leong and Lim Siew Chong were appointed to represent the Estate of the then first defendant and substituted as the first and second defendants respectively to the action. He then referred to Civil Suit No. 261 of 1969 against Lim Sian Soon and Bank Bumiputra Sendirian Berhad, which was in all material respects, and especially as to the reliefs claimed and as to the land in question, similar to the present action, and in which an order was made on November 20, 1970 requiring the said Lim Sian Soon, *inter alia*, to make an application at his own expense under section 137 of the National Land Code for subdivision of the land comprised in Holding 143. The plaintiff next stated in his affidavit that according to enquiries made no application had been made for the subdivision of Holding 143, and he concluded his affidavit by annexing thereto a valuation report according to which the area agreed to be sold to him was valued to $1.50 per square foot and the building thereon at $7,000.

In opposing the motion, the second defendant filed an affidavit in which he took numerous objections to the procedure which had been adopted by the plaintiff as regards the various steps in the action, and went on to say that as no grant of probate had been issued to him and his co-defendant they were not yet the personal representatives of the estate of Lim Sian Soon deceased, so that the land in question had not become vested in them as such personal representatives, with the result that the remedies under the National Land Code of 1965 were not available to the plaintiff. As regards the order in Civil Suit No. 261 of 1969, he stated that it was irrelevant and not binding on them in this action.

At the hearing of the motion on July 14, 1972 counsel for the plaintiff referred to the notice of motion as supported by the plaintiff's affidavit and to Order 27, rule 11 under which the action had been set down on motion for judgment. Counsel for the defendants took numerous objections to the procedure adopted by the plaintiff and went on to point out that time was not made the essence of the contract and that the defendants had not yet extracted their grant

of probate. In reply, counsel for the plaintiff said that preference was for damages for breach of agreement as stated in the amended statement of claim and not for specific performance.

In the event the learned judge gave judgment in terms of prayer 7 of the notice of motion and made an order for damages for breach of contract against the defendants with costs. Against that judgment the defendants have appealed to this court.

A number of grounds in support of the appeal turn on questions of procedure. First, it is said that as the original first defendant entered an appearance but did not file and deliver his defence, the plaintiff should have applied for summary judgment under Order 14A of the Rules of the Supreme Court, 1957. Secondly, it is said that the plaintiff should have set down the action on motion for judgment under Order 27 rule 11, instead of which he gave notice of trial under Order 36 rule 11 and had the action set down for trial under Order 36 rule 11A. Thirdly, it is submitted that as the action related to land the plaintiff took precipitate action under Order 16 rule 46 to have Lim Siew Leong and Lim Siew Chong appointed to represent the estate of Lim Sian Soon deceased when an order for specific performance could be made against them only as the legal personal representatives of the deceased on a grant of probate being issued to them. Fourthly, it is said that whilst the action remained set down for trial, the plaintiff without taking steps to have the notice of trial countermanded by consent or leave of the court as required by Order 36 rule 19, proceeded wrongly to apply for judgment under Order 27 rule 11 by notice of motion dated June 8, 1972 in terms of the prayers contained in the amended statement of claim. Lastly, it is said that the notice of motion was not signed by the plaintiff's solicitors.

A general answer to all these questions is that by virtue of the provisions of Order 70 non-compliance with any rules of practice does not render any proceedings void unless the court so directs. To deal with the specific questions, the plaintiff was not obliged to apply for summary judgment under Order 14A, the procedure under that order being merely permissive. It is true that he should have taken out a motion for judgment, instead of setting the action down for trial, but ultimately he did take out a motion for judgment in terms of the amended statement of claim after the action against the original second defendant was withdrawn and the present appellants were substituted as defendants in place of the original first defendant under a consent order about which I can find no irregularity, especially when they are in fact the executors and trustees of the deceased defendant. I also find that the notice of motion was in fact signed by the plaintiff's solicitors, so that there is no substance in the ground that it had not been regularly issued.

Another complaint by the appellants is that the learned trial judge erred in law and in fact in accepting the pleadings and the order made in Civil Suit No. 261 of 1969 in arriving at his findings in the present action. Speaking of the order in that suit, the learned judge says in his grounds of judgment:

> "In that action the defendant was ordered to make application under section 137 of the National Land Code within one month for the sub-division of the land in order to obtain a separate title transferable to the plaintiff in that action. In spite of the order having been made more than 2½ years before the hearing of this matter, no action has been taken to make the application. The land, which is the subject matter of this action, forms part of Lot No. 143 and it would be reasonable to anticipate that the defendants here will also probably take no action under section 137 in the present matter."

He then goes on to conclude:

> "I was satisfied that if an order for specific performance were made, it was highly unlikely that it would ever be carried out and therefore such an order might for all practical purposes be useless. I therefore gave judgment in terms of prayer 7 of the notice of motion and made an order for damages for breach of contract against the defendants with costs."

In thus stating his reason for not ordering specific performance and awarding damages instead, the learned judge would appear to have overlooked the fact that the defendant was dead within 29 days from the date of the order in the earlier suit. Quite apart from that fact, the real question for him to determine was whether the plaintiff was entitled to damages as opposed to specific performance, regard being had to the terms of the amended statement of claim on the basis of which the motion for judgment was made. That, in fact, is the main question to be decided in this appeal.

As the learned trial judge has stated in his grounds of judgment, it is an established principle of law that where an application for judgment is made under Order 27 rule 11, the facts set out in the statement of claim are taken as admitted under the rules and no evidence or affidavit in support of them will be required. It is common ground that the plaintiff's action survived the death of the original first defendant and became enforceable against the present defendants as his executors. The only breach of contract alleged in the amended statement of claim was that the deceased defendant had in breach of the agreement charged the land to the Bank. There was, however, no allegation that the deceased had undertaken by the terms of the agreement not to charge the land in question. Assuming that such a term was implied in the agreement, so long as the deceased could make a good title to the property at the time of completion, the existence of the charge was an objection to conveyancing and not an objection to title.

Where subsequently to the contract the vendor sells away the subject matter of the contract to a third party, the court will be justified in drawing the inference that he had thereby shown his intention to abandon the contract so far as specific performance thereof was concerned and also disabled himself from performing the contract in the sense of conveying the property to the original purchaser. Where however the subsequent transaction entered into by him is not in the nature of a sale of the subject matter of the contract and there is nothing to show that he intended to abandon the contract or to treat it as at an end, the question whether by such transaction he has incapacitated or disabled himself from performing his part of the contract will be a question of fact, to be determined in the light of several considerations. The

vendor's obligation to deliver possession arises when the purchase money is paid by the purchaser and the document of sale is executed by the vendor. It is with reference to these considerations that the question of the vendor's ability to carry out the several obligations imposed upon him by law as vendor must be determined. It is not therefore right in all cases to take the state of things as on the date of the institution of the suit as conclusive. (See *Ramakrishnayya* v. *Sreeramulu*[1]).

Applying the above principle to the facts of the present case, it would seem clear that if the plaintiff thought that by charging his land the deceased defendant had committed a breach of the agreement, it was open to him to repudiate the contract and sue for damages for breach of contract. This he did not do. On the contrary, he affirmed the contract at all material times. In answer to his solicitors' letter, the deceased defendant had said that he was taking steps to redeem the mortgage, and it is common ground that the charge had been paid off so that the land was free from encumbrances as on the date of the motion for judgment.

It was alleged in paragraph 10 of the amended statement of claim that the deceased had neglected, refused and continued to neglect and refuse to take any steps towards the completion of the agreement for sale. The answer to that allegation is that time was not of the essence of the contract and no subsequent notice was ever given by the plaintiff to the deceased vendor making it so. The law is that if there is default or unreasonable delay by one party, the other party may give notice requiring completion within a specified time.

It is true that if a contract is silent as to time for performance, the law implies that it is to be performed within a reasonable time. But what period is reasonable is a question of fact. In the present case the plaintiff himself remained silent from April 20, 1962 until November 16, 1968 when he caused his solicitors to write a letter to the deceased vendor requesting him to perform his obligations under the agreement. Even then no specific time was given to the deceased to complete the contract. When the deceased wrote back to say that he was going to apply for subdivision of the land, again no notice was given to him stipulating the period with which he must make the application. In paragraph 6 of his amended statement of claim the plaintiff stated that he had at all material times been and still was ready and willing to fulfil all his obligations under the agreement. There was no averment in the amended statement of claim that the plaintiff had suffered any damage as a result of the deceased vendor's alleged breach of contract. He had in fact gone into possession of the land even before he had paid the full purchase price and built thereon a dwelling house, the use of which he has enjoyed during all these years.

I need hardly repeat that at all material times the plaintiff affirmed the contract. He never made time the essence of the contract. Neither the deceased nor the appellants ever repudiated the contract. Right up to the time of the hearing of the motion for judgment or in the course of such hearing the plaintiff did not abandon his claim for specific performance. If an amendment upon the record would have altered the case, it was for him to make such an amendment, or ask for leave to make it at the proper time and in the proper manner. The proper time would *prima facie* have been when the deceased defendant or the present defendants did an act which made specific performance of the contract impossible. Having omitted to amend then, he could have applied for an amendment at the hearing. A plaintiff has his option with regard to the form of action he will bring and the remedy he will claim. The plaintiff in the present claim having elected to sue for specific performance, offering in the usual way on his part specifically to perform the agreement and alleging his readiness and willingness to do so, I construe the prayer at the end of his claim to be a prayer for specific performance, with an alternative prayer for damages as a substitute for specific performance, in case the court for any reason should not see its way to granting specific performance.

In *Thrope* v. *Fasey*,[2] it was held that there is no distinction between the nature of a repudiation which is required to constitute an anticipatory breach of contract, and that which is required where the breach occurs after the time for performance has arisen, and that as on the facts the plaintiff had never made time of the essence and the defendant had never repudiated the contract, there had been no breach with the result that the claim for damages failed. Wynn-Parry J. said at page 657:

> "The plaintiff has pressed as his main claim his claim for damages at law on the ground that the defendant has broken the contract. It is not, of course, every breach of a contract that will give rise to damages and as regards the damages which are asked for under this head, the only breach that will support such a claim is a breach which amounts to a repudiation by the defendant of the contract, the repudiation being accepted by the plaintiff. For that purpose I think it is essential to show that an essential term of the contract has been broken. The term in question is the failure to complete. In equity that is a failure which is not necessarily fatal to the contract, and equity takes the view that failure to perform the contract on the day fixed is not a failure going to the root of the contract unless the parties have made time of the essence of the contract."

The claim for recission also failed in as much as the cases indicated that there was a well established principle that if a contract is to be rescinded it must be rescinded in toto, the parties being put in *status quo* which is not possible if the contract has been partly performed.

In *Mama* v. *Sassoon*,[3] which was followed by this court in *Lee Hoy & Anor.* v. *Chen Chi*[4] in holding that the court can only award compensation in a case where the plaintiff asks for specific performance, their Lordships of the Privy Council emphasized the distinction between a claim for damages on the footing that the contract had been broken by the defendant and the breach had been accepted by the plaintiff and a claim for damages as merely an alternative to a claim for specific performance. They pointed out that in the latter case the plaintiff affirms the existence of the contract even at the date of the suit and it will not be open to him in such a case to fall back

upon what they referred to as a common law claim for damages on the footing of a beach of contract already committed by the defendant. In the present case, the plaintiff clearly elected to treat the contract as in force notwithstanding the defendants' default, so that his claim for damages was not sustainable as an independent claim.

I would therefore allow the appeal, setting aside the judgment appealed from and substituting in its place a declaration in terms of prayer 1 of the amended statement of claim and an order by way of specific performance that within seven days of the issue of the grant of probate to them the defendants do apply to have the land in question transmitted to them as personal representatives of the deceased, that within seven days from the date of their being registered as personal representatives they do make an application at their own expense under section 137 of the National Land Code for approval of the sub-division of the land comprised in Holding 143 so as to obtain a separate title to the portion sold to the plaintiff, and that within fourteen days of the issue of such title to them they do execute a valid and registrable transfer of the said portion in favour of the plaintiff. The respondent to pay the costs of this appeal to the appellants. There will be liberty to apply to both parties.

Azmi L.P. and **Suffian F.J.** concurred.

Appeal allowed.

Solicitors: *Sault, Thara & Co.; Allen, Gledhill & Ball.*

JONG CHAN SIONG v. LOH SHUI KIN

[F.C. (Ismail Khan C.J. (Borneo), Gill F.J. and Pawan Ahmad J.) March 5, 1973

[Kuching — Federal Court Civil Appeal No. 49 of 1972]

Will — Bequest for benefit of family — Meaning of "family" — Whether includes adopted children — Chinese custom in Sarawak — Kheh community — Expert evidence.

Chinese Customary Law — Kheh community — "Family" — Whether includes adopted children.

This was an appeal from the decision of the learned judge of the High Court at Kuching who had held that the respondent and one Jong Chee Chin, an adopted son of the testator were the only persons entitled to the residuary estate of the testator. The testator had a number of adopted children, besides Jong Chee Chin. In his will he made bequests for the benefit of his family and the question for determination was the construction to be placed on the word "family". The learned judge accepted expert evidence that the word "family" according to the usage of the Tai Poo Kheh community, would include the adopted sons as persons entitled to share in the estate of a deceased. The learned trial judge however held that the word "family" could only refer to the respondent and Jong Chee Chin as they were the persons whose names were mentioned in the will. The appellant, an adopted son, appealed.

Held, allowing the appeal: the word "family" in the will must be given its ordinary meaning among the Tai Poo Kheh community and must be read to mean the respondent and all the adopted sons of the deceased.

Case referred to:-

(1) *Perrin* v. *Morgan* [1943] A.C. 399 at p. 420.

FEDERAL COURT.

Sim Teck Kui for the appellant.

Fong Joo Chung for the respondent.

Ismail Khan C.J. (Borneo): By his will dated the 10th day of March, 1952, the testator, Jong Siang Fam, after making certain specific bequests, directed in clause 7 thereof as follows: —

"7. I devise and bequeath to my trustees all the residue of my real and personal estate as follows:

(a) one shophouse at No. 21 Padungan Road, Kuching,

(b) one shophouse at No. 39 Wayang Street, Kuching,

(c) one shophouse at No. 61 Wayang Street, Kuching,

(d) one shophouse at No. 63 Ewe Hai Street, Kuching,

(e) The $20,000 share in the Nyan Shin Pawn Shop, Kuching, upon the trusts following, that is to say:

(a) Upon trust to pay or provide for my debts funeral and testamentary expenses and the said legacies.

(b) Upon trust to provide $20,000 for the erection of any permanent building or buildings for educational or cultural use in my name as my trustees in their uncontrolled discretion shall decide.

(c) Upon trust out of the income of the trust property to pay to my said wife the monthly allowance of $150 for the maintenance of herself and the said Jong Chee Chin, to provide a fund for the relief of the poor in my "Jau Hah" village in China as well as for scholarships and to give welfare or educational institutions in Kuching which appeal for public help such sum of money as my trustees in their uncontrolled discretion shall determine.

(d) Subject as aforesaid my trustees shall invest the residue of all clear moneys and stand possessed of such investments and of the residue of such investments as aforesaid which formed part of my estate at the time of my death and of all parts of my estate for the time being unsold for the *benefit of my family.*

(e) Subject as aforesaid upon trust to hold the capital and income of my residuary estate *for my family* until my adopted son Jong Chee Chin attains the age of 21 years."

The testator died on the 17th day of February, 1953.

In December, 1953, Loh Shui Kin, his widow, co-executrix and trustee of the will, took out a summons in the High Court at Kuching to determine, *inter alia,* whether she and one Jong Chee Chin, an adopted son of the testator, were the only persons entitled to the residuary estate of the testator.

In the event the learned judge decided in favour of the applicant. From this judgment, Jong Chan Siong, another adopted son of the testator, appealed.

In this appeal the question for determination is the construction to be placed on the word "family" appearing in clause 7(2)(d) and (e) of the will.

For a better appreciation of the point raised, I set out below the facts forming the background to the dispute.

The testator was a Tai Poo Kheh. In his lifetime he carried on the business of a printing press and owned considerable property. He married twice. His first wife, Siaw Chii (hereinafter called the deceased) predeceased him. There was no issue of the marriage. During the lifetime of the deceased, she and the testator adopted two of his nephews — the appellant, a son of the testator's brother one Jong Joon Fam, and